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against a man for breach of an order you must show that the order clearly and unequivocally prohibits the thing which he is said to have done. If the order be ambiguous and open to two interpretations, you must adopt the one most favourable to the accused, and not the other. In the present case the earlier part of the Magistrate's order shows, we think, pretty clearly what he was thinking of when he came to the conclusion that the new hât should be prohibited. He was thinking of the action of Gobinda Chunder Sahu, and of the people who were acting for or with him, that is to say, he was thinking of the conduct of persons who established the hât, opened it, managed it and tried to bring people to it to buy and sell; and having described their action as likely to induce a serious breach of the peace, he proceeds to prohibit Gobinda Chunder Sahu and all other persons from *holding* the hât. In that connection it is almost impossible to read the words "holding the hât" in any other sense than that which we have described, that is, in the sense of holding as owner or manager. It is almost impossible to read the words as including the conduct of people who do not hold the hât as owners and managers, but who frequent it as buyers or sellers. But if we are wrong in this interpretation of the words, at any rate it is clear that the order, looking at it in the most favourable light for the prosecution, is ambiguous, and does not clearly and unmistakably prohibit traders from buying and selling in the hât.

That being so, the conviction cannot stand, and must be set aside.

J. V. W. *Conviction set aside.*

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Rampini.

JOYNARAYAN SINGH (JUDGMENT-DEBTOR) *v.* MUDHOO SUDUN SINGH (ADJUDICATING-CREDITOR).*

1888 *August* 10.

Jurisdiction—Deputy Commissioner—District Court—Insolvent Judgment-debtors—Civil Procedure Code, 1882, *ss.* 344, 360—*Application to be declared insolvent.*

The Court of the Judicial Commissioner, and not that of a Deputy Commissioner, is the "District Court" in Chota Nagpur under ss. 2 and 344 of the Civil

* Appeal from Order No. 187 of 1888, against the order of E. N. Baker, Esq., Deputy Commissioner of Manbhoom, dated the 28th of April 1888.

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Procedure Code. A Deputy Commissioner therefore invested by the local Government with powers under s. 360 of the Code has no jurisdiction, apart from any transfer by the "District Court," to entertain an application by a judgment-creditor under s. 344 to have his judgment-debtor declared an insolvent.

In re Waller (1); and *Purbhudas Velji* v. *Chugun Raichand* (2), followed. The question of jurisdiction not having been raised in the lower Court the order was set aside without costs.

THIS was an application under the second clause of s. 344 of the Civil Procedure Code by the holder of a decree for money, praying that the judgment-debtor might be declared insolvent.

The only question material to this report was as to the jurisdiction of the Court of the Deputy Commissioner to entertain the application.

Mr. *R. Allen*, Baboo *Ashutosh Dhur*, and Baboo *Rajendronath Bose* for the appellant.

The *Advocate-General* (Sir *G. C. Paul*), Mr. *Woodroffe*, and Baboo *Pran Nath Pandit* for the respondent.

The judgment of the Court (WILSON and RAMPINI, JJ.) was as follows:—

WILSON, J.—This is a matter brought before us by way of appeal from an order of the Deputy Commissioner of Manbhoom in Chota Nagpur. Acting under Chapter XX of the Code of Civil Procedure he made an order adjudging a judgment-debtor to be an insolvent, and he did so on the application of the judgment-creditor.

We find ourselves constrained to set aside that order on a ground which unfortunately has no relation to the merits of the case. The ground upon which we are obliged to set aside the order is that the Deputy Commissioner had no jurisdiction to make it.

Under s. 344 of the Civil Procedure Code "any judgment-debtor arrested or imprisoned in execution of a decree for money, or against whose property an order of attachment has been made in execution of such a decree, may apply in writing to be declared an insolvent;" and "any holder of a decree for money may apply in writing that the judgment-debtor may be declared an insolvent;" and "every such application shall be made to the District

(1) I. L. R., 6 Mad., 430. (2) I. L. R., 8 Bom., 196.

Court within the local limits of whose jurisdiction the judgment-debtor resides or is in custody." "District Court" is defined thus in s. 2 of the Code: "District means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a District Court)." So that in order to see whether the Deputy Commissioner's Court is a District Court, we have to inquire whether it is a principal Civil Court of original jurisdiction within the district. We find that it is not so. The principal Civil Court of original jurisdiction throughout Chota Nagpur is the Court of the Judicial Commissioner. By gazetted order of the Local Government the Judicial Commissioner is given the jurisdiction of a District Judge throughout Chota Nagpur, and the Deputy Commissioners are given the jurisdiction of Subordinate Judges. It follows that the Deputy Commissioner was not empowered to make such an order as this by the operation of s. 344. But then we have to turn and see whether he has power under s. 360. Under that section "the local Government may, by notification in the Official Gazette, invest any Court, other than a District Court, with the powers conferred on District Courts by ss. 344 to 359 (both inclusive), and the District Judge may transfer to any Court, &c."

We find by reference to the Gazette that the Deputy Commissioner's Court has been invested by the Local Government with the powers that s. 360 authorises that Government to confer. But then in order to see what the powers conferred are we must look at the latter part of s. 360, which says, when such notification has been issued "the District Judge may transfer to any Court situate in his district and so invested any case instituted under s. 344. Any Court so invested may entertain any application under s. 344, by any person arrested in execution of a decree of such Court." So that when a Court, other than a District Court, is specially invested with powers under s. 360, those powers authorise it to deal with two classes of cases: First, cases transferred by the District Court; and, secondly, cases of persons who are in custody in execution of its own decree and who apply under the insolvency section. But there is no power given by s. 360 to any Court other

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than the District Court itself to entertain, apart from any transfer by the District Court, an application by a judgment-creditor to have his judgment-debtor declared an insolvent. This appears clear from the language of the section itself; and the same view has been taken by the Madras and Bombay High Courts. See *In re Waller* (1), and *Purbhudas Velji* v. *Chugun Raichand* (2). It follows therefore that there was no jurisdiction in the Deputy Commissioner to make the order he has made. On that ground we set his order aside.

We find that this objection to jurisdiction was never taken in the first Court. It was not taken in the grounds of appeal to this Court, and indeed it was raised by the Court itself, and not by either of the parties. Under these circumstances, we may fairly set the order aside without costs.

Then an application was made to us by the Advocate-General to order the return of the petition presented to the lower Court, in order that it might be presented again to the Court which has jurisdiction. That is a matter with which we think we ought not to interfere. It should be dealt with by the lower Court.

J. V. W. *Appeal allowed.*

Before Mr. Justice Wilson and Mr. Justice Rampini.

1888
August 2.

JOGOBUNDHOO DASS AND ANOTHER (JUDGMENT-DEBTORS) *v.* HORI RAWOOT AND ANOTHER (DECREE-HOLDERS).*

Civil Procedure Code, 1882, *s.* 230, *cl.* (*b*)—*Limitation—Execution of decree—Order directing payment of money at a certain date.*

A judgment-debtor on being arrested in execution of a decree presented a petition asking for fifteen days' time to pay the amount of the decree, and, the decree-holders consenting, the Court made an order in the terms, "let the petition be filed." *Held*, that this order did not amount to one directing payment of money to be made at a certain date within the meaning of s. 230, cl. (*b*) of the Civil Procedure Code.

Bal Chand v. *Raghunath Das* (3) followed.

* Appeal from Order No. 7 of 1888, against the order of J. B. Worgan, Esq., Judge of Cuttack, dated the 8th of September 1887, reversing the order of Baboo Mati Lal Singh, Munsiff of that district, dated the 29th of March 1887.

(1) I. L. R., 6 Mad., 430. (2) I. L. R., 8 Bom., 196.
(3) I. L. R., 4 All., 155.

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THIS was an application made on the 18th November 1886 for execution of a decree dated 9th January 1874. It appeared that on the 21st August 1882 one of the judgment-debtors, on his being arrested in execution of the decree, had presented a petition to the Court for fifteen days' time to pay up the amount of the decree, which petition (the decree-holder consenting) was ordered to be filed, and the time was allowed, the judgment-debtor being released from arrest. He failed, however, to pay the amount of the decree. The only question material to this report was whether the order made on this petition amounted to a direction by the Court for "the payment of money on a certain date" within the meaning of s. 230, sub-section (*b*).

The decree-holder contended that it did, and that he was therefore entitled to reckon the twelve years' limitation from the expiration of the fifteen days' time when default was made in paying the amount of the decree. The judgment-debtor contended that execution of the decree was barred by limitation which was to be reckoned from the date of the decree, and that the order made on the petition did not create a new starting point from which the time could run.

The lower Appellate Court (reversing the decision of the Munsiff, before whom however the point as to the effect of the order on the petition was not raised) held that the order was virtually one under s. 230, cl. (*b*), and that execution of the decree was therefore not barred.

From this decision the judgment-debtors appealed to the High Court.

Baboo *Mon Mohun Dutt* for the appellants.

Dr. *Guru Dass Banerji* for the respondents.

For the appellants the case of *Bal Chand* v. *Raghunath Das* (1) was relied on, and for the respondents the case of *Jhoti Sahu* v. *Bhubun Gir* (2) was referred to.

The judgment of the Court (WILSON and RAMPINI, JJ.) was as follows:—

WILSON, J.—In this case we think that the lower Appellate Court is in error in the view it has taken of the law.

(1) I. L. R., 4 All., 155. (2) I. L. R., 11 Calc., 143.

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The application was one for execution, and was made more than twelve years after the date of the decree. In the first Court the Munsiff dismissed the application on that ground, the application being, in his opinion, too late under s. 230 of the Code of Civil Procedure. The lower Appellate Court has considered that the application is saved from the bar of limitation by reason of sub-section (*b*) of s. 230, which says: "Where the decree or any subsequent order directs any payment of money, or the delivery of any property, to be made at a certain date, 'the twelve years is to run from the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree.'"

Now it is sought to show that there was a subsequent order directing payment to be made on a certain date by reason of these circumstances: A prior application for execution by attachment of the person of one of the judgment-debtors was made within twelve years of the date of the decree and within twelve years previous to the date of the present application. When that judgment-debtor had been arrested he put in a petition asking that he might have fifteen days' time within which to pay up the amount of the decree and so escape committal to prison. That petition was consented to, and the order made on it was, "let the petition be filed." The lower Appellate Court has considered that that order amounts to an order to pay on or before the 15th day. We think that *that* is a very considerable extension of the order. In form certainly it is nothing of the kind; and even if we could suppose that the order adopts the terms of the petition, and can be read as embodying what appears in the petition, still it would not be an order for payment. The petition contains no new promise to pay; it simply asks for a stay of proceedings for fifteen days to enable the petitioner to pay up the amount of the decree—the alternative obviously being that, on expiry of the fifteen days, if the money was not paid, the execution proceedings should go on. This case therefore differs materially from the case of *Jhoti Sahu* v. *Bhubun Gir* (1). In that case there was not a mere petition for time, but an actual agreement by way of compromise entered

(1) I. L. R., 11 Calc., 143.

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into between the parties for payment in certain ways; and the order was, that it should be recorded. The learned Judges in that case considered that the order there might be regarded as one embodying the compromise, and that, the compromise being an actual undertaking to pay, the order was an order to pay. On the other hand in the case of *Bal Chand* v. *Raghunath Das* (1) the facts are precisely similar to those of the present case; and the learned Judges there took the same view as we have taken here. For these reasons we think that the view taken by the lower Appellate Court cannot be supported.

The result is that the order of the lower Appellate Court must be set aside, and the order of the first Court, the Munsiff, affirmed, with costs.

J. V. W. *Appeal allowed.*

Before Mr. Justice Tottenham and Mr. Justice Ghose.

HORENDRANARAIN ACHARJI CHOWDHRY (PLAINTIFF) *v.* CHANDRAKANTA LAHIRI AND ANOTHER (DEFENDANTS).*

1888 *August* 10.

Will—Attestation of will—Purda nashin lady—"In the presence of"—Succession Act (X of 1865), *s.* 50.

After execution of her will by a testatrix, a *purda nashin* lady, and its attestation in her presence by a witness who had seen her execute it, it was presented for registration, the testatrix sitting behind one fold of a door which was closed, the other fold being open, and the registrar and another person who identified the testatrix being in the verandah outside the room behind the door of which the testatrix sat, all that the registrar actually saw of her being her hand. The testatrix admitted her execution of the will, and her admission was endorsed on the will and witnessed by the registrar and the person who identified her at the same time. *Held*, that the witness was "in the presence of" the testatrix within the meaning of s. 50 of the Succession Act (X of 1865).

THIS appeal was brought in the matter of an application for probate of the will of one Rudramani Debya, a *purda nashin* lady, widow of one Kalichundra Lahiri. The will was executed on the 24th Kartick 1291 (8th November 1884), and the testatrix died on the 24th Aughran 1291 (8th December 1884).

* Appeal from Original Decree No. 67 of 1887, against the decree of J. R. Hallett, Esq., Judge of Rungpore, dated the 5th of February 1887.

(1) I. L. R., 4 All., 155.

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The only question material to this report was whether the attestation of the will was sufficient to satisfy the requirements of s. 50 of the Succession Act (X of 1865). The evidence showed that, though the will was executed in the presence of the witnesses, only one of the witnesses, *viz.*, Shurut Chunder Bandopadhya, who was also the writer of the will and had signed it for the testatrix in her presence and by her direction, signed it in the presence of the testatrix; the other witnesses having been told by the testatrix to go and sign it downstairs because she wanted to perform her *puja*. A commission was issued for the examination of other witnesses, one of whom stated that one of the other witnesses to the will also signed the will in the presence of the testatrix, but his evidence as to this was disbelieved by the Judge. It appeared, however, that, the Registrar of Calcutta having been sent for, the will was on the same day presented for registration, when execution was admitted to the Registrar by the testatrix, who was identified by her medical attendant Kedarnath Singha, both the Registrar and Kedarnath Singha signing their names as witnesses. At the time of the registration the testatrix was inside a room behind one fold of a door, the other fold of which was open, and the Registrar and the other witnesses were in the verandah into which the door opened.

The cases of *In the goods of Roymony Dossee* (1), *Hurro Sundari Dabya* v. *Chunder Kant Bhuttacharjee* (2), and *Nitye Gopal Sircar* v. *Nagendra Nath Mitter* (3), have decided that if a signature on a will is admitted by the testator to be his, and he is identified before the Registrar by one of the witnesses to the signature, and both the Registrar and identifier sign their names as witnesses to the admission made, such an attestation is sufficient to satisfy s. 50 of the Succession Act. The only question in the present case was whether the signatures were affixed "in the presence of" the testatrix within the meaning of that section. The evidence of the Registrar was not before the lower Court, and that Court thought the evidence of the witness examined on the commission, who stated he had signed the will in the presence of the testatrix, unsatisfactory, and refused the application for probate.

(1) I. L. R., 1 Calc., 150. (2) I. L. R., 6 Calc., 17.
(3) I. L. R., 11 Calc., 429.

The applicant appealed to the High Court.

Mr. *Woodroffe*, Baboo *Grish Chunder Chowdhry*, and Baboo *Horendro Nath Mukerji*, for the appellant.

Baboo *Hem Chunder Banerjee*, and Baboo *Jadub Chunder Seal*, for the respondents.

For the appellant it was contended that the attestation was sufficient. The test is whether the testatrix could have seen the witnesses had she chosen to look—Williams on Executors, 8th Ed., p. 93; *In the goods of Piercy* (1); *Newton* v. *Clarke* (2); *Casson* v. *Dade* (3); *In the goods of Trinmel* (4); *Shires* v. *Glascock* (5); *Day* v. *Smith* (6); *Todd* v. *Winchelsea* (7); *Norton* v. *Basset* (8). The cases on this point where the attestation was held to be insufficient are cases where, under the circumstances, the testator could not have seen the witnesses even had he desired to do so.

It was only absolutely necessary at the registration of the will that there should be *one* witness, as the execution had already been attested by one witness, and it is not necessary that both the witnesses should sign at the same time.

For the respondents on this point the following cases were cited: *Doe* v. *Manifold* (9); *Winchelsea* v. *Wauchope* (10); *In the goods of Killick* (11); *In the goods of Newman* (12); *In the goods of Ellis* (13); *In the goods of Colman* (14); *Tribe* v. *Tribe* (15).

The judgment of the Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

This is an appeal against a decree of the District Judge of Rungpore, refusing probate of a will alleged to have been executed by Rudramani Debya. The judgment of the Court below is very short; and it is not quite clear from that judgment whether

(1) 1 Robert, 278.
(2) 2 Curt., 320.
(3) 1 Bro. C. C., 99.
(4) 11 Jur. N. S., 248.
(5) 2 Salk., 688.
(6) 3 Salk., 395.
(7) M. and Malk., 12; S. C. 1 C. & P., 488.
(8) Dea and Sw., 253.
(9) 1 M. and S., 249.
(10) 3 Russ., 441.
(11) 10 Jus. N. S., 1083.
(12) 1 Curt., 914.
(13) 2 Curt., 395.
(14) 3 Curt., 118.
(15) 1 Robert, 775.

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the Court below disbelieved the *factum* of the will or refused probate merely because the requirements of the law, as stated in s. 50 of the Indian Succession Act, made applicable to Hindus by the Hindu Wills Act, had not been fulfilled in the matter of attestation.

The learned counsel, who argued the appeal on behalf of the appellant-petitioner for probate, assumed in opening that the *factum* of the will was undisputed, and that it was left to him to argue only the point as to due attestation.

The learned vakil, however, who appeared for the respondents, strenuously contended that the will was not genuine, in addition to the defect in attestation. Section 50 of the Indian Succession Act requires, for the due execution of a will, that it shall be signed or marked by the testator, or, at his request, by somebody on his behalf, in the presence of two witnesses, and that the witnesses who attest it must sign the will in the presence of the testator. In the present case it appeared at the trial that only one of the attesting witnesses had signed the will in the actual presence of the testatrix. The first witness examined stated that, when the testatrix had signed the will, she desired the rest of the persons present to go downstairs, as she wished to perform her *puja*, and that the other witnesses signed in a room below, where the testatrix could not see them. This being the state of things shown in the District Court at the first hearing, a commission was issued to examine certain witnesses in Calcutta. One of these witnesses supplemented the case of the petitioner, so far as he said that one of the witnesses signed in the presence of the testatrix; but the District Judge disbelieved his evidence on this point, and possibly disbelieved the whole evidence in support of the will. But in the result he held that probate should not be granted, and dismissed the application.

At the close of the learned Counsel's address for the appellant we were prepared to call for further evidence as to the attestation, because it appeared that the will itself had been registered, and the endorsements on the back purported to show that the will having been acknowledged by the testatrix in the presence of the Registrar and other persons, the Registrar and another witness signed the endorsement showing that she had admitted the

execution. And previous cases, decided in this Court, have held that such attestation by the Registrar would be sufficient. We have been referred to the case of *Hurro Sundari Dabya* v. *Chunder Kant Bhuttacharjee* (1), and to another case, *Nitye Gopal Sircar* v. *Nagendra Nath Mitter* (2), in which we ourselves were Judges, and in which we followed the law as laid down in the previous case. But upon hearing the respondents' pleader we found that he disputed the *factum* of the will itself. Therefore, before making up our mind to have further evidence, we thought it proper to hear him out. He urged many points against the will being accepted as a genuine document. He pointed out that the applicant for probate himself did not come forward to depose, nor did any other member of the family. He also pointed out discrepancies in the evidence, and he relied upon the state of the record, as it stood, as fully supporting the judgment of the lower Court. Assuming that judgment to be one against the *factum* of the will itself, he of course also relied upon the defect in the attestation which the learned counsel for the appellant had been compelled to admit. But upon a full consideration of the evidence we came to the conclusion that the document was unquestionably genuine, that is, the testatrix had really and intentionally signed it herself, fully knowing what its purport was. That being so, we considered it necessary, in order to come to a proper judgment in the case, to obtain the evidence of the Registrar of Calcutta and the other witness whose name appears on the endorsement. It seemed to us that, if the Registrar was in a position to prove beyond doubt that he had actually signed this endorsement in the presence of the testatrix, his evidence would be sufficient to complete the case of the petitioner. We accordingly adjourned the hearing to this day. And to-day we have examined the Registrar and Baboo Kedarnath Singha, the other witness.

As regards Baboo Kedarnath Singha, we are not able to place any great reliance upon his statement. But as regards the evidence of Baboo Pertap Chunder Chose, the Registrar of Calcutta, we think it unexceptionable, excepting so far as his

(1) I. L. R., 6 Calc., 17. (2) I. L. R., 11 Calc., 429.

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memory, after the lapse of four years, has deceived him. There is a discrepancy between his evidence and that of Kedarnath Singha as to the particular place in which the registration was effected, that is to say, whether it took place upstairs or downstairs, and whether the Registrar was in the verandah outside the room in which the testatrix sat, or in the same room. Speaking for myself, what weighs with me most in the Registrar's evidence is his positive assurance that in such a case as this he never omits to make the endorsements and sign them then and there in the presence of the executant. He was asked if he had ever postponed making the endorsements until he returned to his office, then filling up the endorsements at his leisure; and he said that he never did so: and he also stated that he was especially careful in the case of a will to satisfy himself that the executant knew what the contents of the document were. He tells us that the testatrix in this case was decidedly an intelligent lady, and she repeated the substance of the contents of the will. From his evidence it would appear that he and the other witness were in the verandah outside the room, behind the door of which the lady sat. He remembers that she sat behind one fold of the door which was closed, and the other fold open, she being seated behind the fold closed; he also stated that all he saw of her was her hand. The question is therefore whether he was in her presence within the meaning of s. 50. It seems to have been held in English cases that "in the presence of the testator" would include his being in such a position that he could, if he chose, see the witnesses. We think that the testatrix in this case, if she sat behind one fold of the door, the Registrar being admittedly outside in the verandah, might, if she chose, without leaving her seat, have seen him by putting her head forward. It is obvious that it is not absolutely necessary that the testator should actually see the witnesses who attest the will, because a blind person may execute a will. It has been held in England that if a blind person is so placed as, if he had not been blind, he could have seen the witnesses, these witnesses were in his presence within the meaning of the law. That is the case of *In the goods of Piercy* (1). There is another case—*Newton* v. *Clarke* (2)—

(1) 1 Robert, 278. (2) 2 Curt., 320.

in which the testator signed his will while lying in his bed. There were two attesting witnesses, one of whom the testator could see and could be seen by him, and the other witness was so placed behind a curtain that neither could he see, nor could be seen by, the testator; it was held, however, that both witnesses were sufficiently in the presence of the testator to make their attestation valid. That we think is a very fair case to follow in the case of a *purda nashin* lady. It is unquestionable that had the fold of the door been removed the testatrix in this case would have been able to see the witnesses who signed and attested her will. It also appears to our mind that the testatrix could have seen them by putting her head forward.

That being so, we think probate of the will should be granted.

We accordingly set aside the decree of the lower Court, and decree the appeal. But under the circumstances we do not think we ought to make the respondent pay the costs, for upon the evidence before the District Judge he was right in refusing probate

J. V. W. *Appeal allowed.*

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

ISHUR CHUNDER BHADURI (PLAINTIFF) *v.* JIBUN KUMARI BIBI (DEFENDANT).*

1888 *July* 27.

Limitation Act, 1877, *Arts.* 59 *and* 60—*Money deposited—Banker and Customer—Money lent—"Deposit"—"Trust"—Cause of action—Demand.*

The plaintiff deposited from time to time with the firm of the defendant, who carried on a banking business, various sums of money, the amounts deposited bearing interest, and at times certain sums being withdrawn by the plaintiff, and an account of the balance of principal and interest being struck at the end of each year and presented to the plaintiff. The date of the first deposit was not known, but it was some time previous to 1282 (1875). A demand was made for the whole amount of the principal and interest in Bhadro 1292 (August—September 1885), and the demand not having been complied with, a suit to recover the money was brought on the 8th March 1886. *Held*, that s. 60 and not s. 59 of the Limitation Act was applicable to the case; the cause of action therefore arose at the date of the demand and the suit was not barred.

* Appeal from Appellate Decree No. 1933 of 1887, against the decree of G. G. Dey, Esq., Judge of Pubna and Bogra, dated the 29th of June 1887, reversing the decree of Baboo Bulloram Mullick, Subordinate Judge of that district, dated the 29th of December 1886.

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The *dictum* of WHITE, J., in the case of *Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (1), that "the word 'deposit' in the Limitation Act as distinct from 'loan' points to cases where money is lodged with another under an express trust or under circumstances from which a trust may be implied," dissented from.

IN this case the plaintiff in his plaint stated that there was a money-lending business carried on in the names of the defendant's husband Meher Chand and her son Golap Chand Nowlakha at Bander Nil, Serajgunj; that his brother, the late Brojo Sunder Bhaduri, used "to deposit money from a long time in the *tahabil* of the said business," in the name of his eldest brother, the late Ram Sunder Bhaduri, and in his own name,-and he used to draw interest, &c., on the same; that after the death of the said Brojo Sunder Bhaduri in 1282 (1875) the plaintiff used to deposit money with the defendant's firm, and received up to the month of Bysakh 1290 (April 1883) interest, &c., from the same through his brother Grish Chunder Bhaduri; that the amount of interest on the money deposited was at the rate of eight annas per cent. per mensem, and that the sum of Rs. 3,866-4-7½ was due to him on account of principal and interest; that a hundi was drawn on the 22nd Srabun 1292 (6th August 1885) on the defendant's firm at Calcutta, but that it was dishonored, and that subsequently in Bhadro 1292 (August 16th—September 16th 1885) Grish Chunder Bhaduri went to the defendant's place of business in Calcutta, and demanded the money, which, however, was not paid. The plaintiff consequently on 8th March 1886 instituted this suit for the amount claimed, stating that his cause of action arose in Bhadro 1292, when the demand was made.

The only defence material to this report was that the suit was barred by limitation, the defendant not admitting the statements in the plaint "as to the time when and circumstances under which the cause of action arose."

The Subordinate Judge, as to the facts of the case, said in his judgment:—

"It is admitted that defendant owned and carried on banking business at Serajgunj under the name of Meher Chand and Golap Chand. The firm used to receive deposits of money from various parties, and paid interest thereon

(1) 6 C. L. R., 470.

at stipulated rates. In respect of petty deposits no interest was paid. It appears that the firm closed business about the end of 1288 B. S. (March—April 1882), when the manager left Serajgunj and a subordinate officer was left in charge for purposes of a winding up. There is no dispute that one Brojo Sunder Bhaduri deposited in the firm divers sums of money in the name of Ram Sunder Bhaduri and Brojo Sunder Bhaduri. The date of the first deposit is not known, but it is manifest from the proceedings that the amounts deposited carried interest, that divers sums were withdrawn, and an account was struck at each year's end. An abstract of the account was furnished to the depositors under the hand of the defendant's servant. In 1282 B. S. Brojo Sunder died, but the account was continued by his brother Grish Chunder, who followed the footsteps of his deceased brother till the collapse of the firm. It is alleged in the plaint that the business carried on with defendant's firm partook of the nature of a trust, that the rate of interest stipulated for was 8 annas per cent. per month, and that it lasted until Bysakh 1290 B. S., when interest was paid for the last time. It is alleged that on the 22nd Srabun 1292 defendant dishonored a hundi for Rs. 2,000 drawn upon her; and a demand for the withdrawal of the whole of the deposit, including interest, made in Bhadro following not having been complied with, the present suit has been brought for its recovery. Certain damages are also claimed as having been sustained in consequence of the dishonor of the hundi and non-compliance with the demand. The present suit has been brought by the plaintiff as executor to the estate of Brojo Sunder Bhaduri, deceased. Defendant, in her written statement, has little to say against the claim of the plaintiff on the merits, and her vakeel has distinctly given me to understand that in regard to the merits it is not her intention to raise a contest."

On the question of limitation the Subordinate Judge held that the case was governed by Art. 60 of Sch. II of the Limitation Act of 1877; that the period of limitation ran from the date of the demand; and that, the demand having been made within three years before the institution of the suit, the suit was in time. He accordingly gave the plaintiff a decree for the amount due.

The Judge on appeal held that the suit was one for money lent, and was governed by Art. 59, Sch. II of the Limitation Act, under which limitation began to run from the time when the loan was made. He, therefore, held that the suit was barred, and reversing the decision of the Subordinate Judge dismissed the suit.

From this decision the plaintiff appealed.

Baboo *Jadub Chunder Seal* for the appellant.

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Baboo *Mohesh Chunder Chowdhry*, Dr. *Rash Behari Ghose*, and Baboo *Sharoda Churn Mitter*, for the respondent.

The following cases were referred to :—

Hingun Lall v. *Debee Pershad* (1) ; *Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (2) ; *Tarini Prasad Ghose* v. *Ram Krishna Banerjee* (3) ; *Brammayi Dasi* v. *Abhai Churn Chowdhry* (4) ; *Nasir bin Abdul Habib Fazal* v. *Dayabhai Itchachand* (5) ; and *Jaffree Begum* v. *Mahomed Zahoor Ahsun Khan* (6).

The judgment of the Court (WILSON and O'KINEALY, JJ.) was as follows :—

This is a suit against a banker, or his representative by the representative of an alleged customer of the bank, to recover money deposited with interest.

(After stating the facts as above, and noticing other grounds on which the lower Appellate Court had reversed the decision of the first Court, the judgment continued.)

The remaining ground on which the decree of the first Court was reversed, the ground of limitation, gives rise to more difficulty. The question is whether the case is governed by Art. 59 or Art. 60 of Sch. II of the Limitation Act. Art. 59, dealing with "money lent under an agreement that it shall be payable on demand," prescribes a period of three years from the time "when the loan is made." Art. 60, dealing with "money deposited under an agreement that it shall be payable on demand," prescribes three years from the time "when the demand is made." If the former of these articles governs the case as held by the lower Appellate Court, the suit is barred. If the latter governs, as held by the first Court, the suit is in time.

There can be little doubt probably that the money of a customer in the hands of his banker is money lent. And that Art. (59) might apply to the case if Art. 60 were not present. Probably too on the same supposition such money would often be money received to the use of the customer within the meaning of Art. 62. But the question is not whether such a case is

(1) 24 W. R., 42.
(2) 6 C. L. R., 470.
(3) 6 B. L. R., 160.
(4) 7 B. L. R., 489.
(5) 10 Bom., 300.
(6) 2 N. W., 409.

covered by the words of Art. 59 or any other article, but whether Art. 60 applies to it; for if it does, the more specific provision must prevail.

Assuming money paid to a man's credit with his banker to be money lent to the latter, the loan is at least of a very special kind, having many peculiarities, which have often been pointed out. And the question is whether such a transaction is a deposit within the meaning of Art. 60. That in ordinary and popular language it is so there can, we think, be no doubt. Take up a newspaper, and look at the returns of any bank which publishes the details of its position, and you will always find public and private deposits used in the sense of balances. Indeed "deposit" seems to us the word which any one not a lawyer would be more likely to use than any other to express money in a bank.

In the schedule in question the term "deposit" or its correlatives are used in the article now in question, and in Arts. 133 and 145. In the latter two instances, which have to do with moveable property, it is clear from the context that the deposit meant is a deposit of goods to be returned in specie, and that is in accordance with the old use of "deposition," with which all lawyers are familiar. In Art. 60, dealing with money, it is equally clear that a return in specie is not contemplated. It is so first, because it would be contrary to the ordinary usage of the language to hold such a thing; deposits of money are made, for instance, under many Acts of the Legislature with public officers and others, and no one ever heard of the idea of the return of the identical coins deposited. It is clear, secondly, because the word "payable" excludes such an idea.

So far as the Act itself is concerned then, we have, in order to give a meaning to Art 60, to find a case in which one man places his money in the hands of another, on the terms that an equivalent sum is to be paid back on demand, and a case to which, according to the ordinary usage of the language, the term "deposit" is applicable. And we think the case of the banker and his customer is exactly such a case.

Turning to the authorities, the decisions upon the earlier Limitation Acts do not seem to afford any assistance. There was in them no provision like that in Art. 60. The only

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provisions as to deposits corresponded rather to Art. 145 and clearly contemplated the return of goods in specie.

The meaning of Art. 60 in the schedule to the present Act has been considered in the case of *Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (1). That case came on second appeal before White and Maclean, JJ. The facts are thus stated in the judgment of White, J.: "It has been found by the lower Appellate Court that in 1861 the plaintiff deposited Rs. 1,000 with the defendant's father, who was to pay upon it interest, which was originally fixed at 15 per cent., but was subsequently reduced to 12 per cent., and that up to the close of the year 1282, corresponding with 1876, the plaintiff regularly received her interest. The agreement made at the time of the deposit was, that the money be repayable on demand." That learned Judge then says that "the lower Appellate Court considers that the transaction was a deposit, and that as the demand was alleged to have been only recently made, the plaintiff is not barred." He dissents from the view that the transaction was a deposit; but he held that, viewing the case as one of loan, the same result followed, for interest had been paid within three years. In giving his reasons for not regarding the case as one of deposit under Art. 60 the learned Judge said: "In my opinion the transaction, though called a deposit, was in point of law a loan upon which interest was to run." We quite concur in thinking that the mere use of the term "deposit" cannot alter the substance of the transaction. And in that case, so far as appears from the report, the borrower was not a banker or a person carrying on any business analogous to banking; nor did the lender keep with him anything similar to a banking account. But the learned Judge added: "I think that the word 'deposit' in the Limitation Act, as distinct from 'loan,' points to cases where money is lodged with another under an express trust, or under circumstances from which a trust may be implied." Maclean, J., is only reported to have said: "I concur in dismissing the appeal." There is nothing to show whether he concurred in the view just cited as expressed by White, J., and that view was obviously not necessary to the decision of the case. We are unable

(1) 6 C. L. R., 470.

to concur in the view there expressed by White, J. Had it amounted to a decision of the Bench, we should have thought it necessary to refer the present case to a Full Bench, but as it does not do so, we are bound to act on our own view of the law.

For several reasons we think "deposit" cannot have been used to mean "trust." In the first place, so to hold appears to be giving a wholly new meaning to the word, for which there is no sanction in popular usage or in the ordinary terminology of the law, or in the context in which the word occurs. In the second place, the case of trust is elsewhere provided for in the Limitation Act. Thirdly, to apply Art. 60 to express trusts might lead to great confusion, and might curtail very seriously the beneficial effects of s. 10 of the Act.

We think, therefore, that the suit is not barred by limitation, and that the decree of the lower Appellate Court must be set aside and that of the Subordinate Judge affirmed with costs in all the Courts.

J. V. W. *Appeal allowed.*

Before Mr. Justice Pigot and Mr. Justice Gordon.

IN THE MATTER OF THE APPLICATION OF PORESH NATH CHATTERJEE *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (REPRESENTED BY THE COLLECTOR OF 24-PERGUNNAHS) AND OTHERS.*

1888 *August* 3.

Appeal—Additional Judge—District Judge—Land Acquisition Act (X of 1870), s. 39—Civil Procedure Code (Act XIV of 1882), s. 647.

An Additional Judge appointed to hear cases under the Land Acquisition Act, 1870, is a District Judge within the meaning of s. 39 of the Act. Under s. 647 of the Civil Procedure Code an appeal from the decision of an Additional Judge so appointed lies to the High Court.

THIS was an appeal to the High Court from the order of the Additional Judge of the 24-Pergunnahs, hearing cases under the Land Acquisition Act, 1870, dated the 6th March 1888, refusing to set aside his order of the 1st March made *ex parte*.

Baboo *Horendra Nath Mukerji* for the appellant.

* Appeal from Order No. 209 of 1888, against the order of R. F. Rampini, Esq., Additional Judge of 24-Pergunnahs, dated the 6th of March 1888.

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Baboo *Unnoda Prosaud Banerji* and Moulvie *Seraj-ul-Islam* for the respondents.

Moulvie *Seraj-ul-Islam* took a preliminary objection that an appeal did not lie to the High Court. He contended that an Additional Judge was not a District Judge within the meaning of s. 39 of the Land Acquisition Act, 1870; and that, therefore, an appeal did not lie to the High Court, but to the District Judge. He further contended that the only section of the Civil Procedure which gave a right of appeal against an order rejecting an application to set aside an *ex parte* order or decree was s. 588, cl. 9; but that this section was not applicable to proceedings under the Land Acquisition Act, inasmuch as the sections of the Civil Procedure Code applicable to such proceedings were specified in s. 36 of the Land Acquisition Act and s. 588 was not included in it.

Baboo *Horendra Nath Mukerji* was not called upon to argue this point.

The judgment of the Court (PIGOT and GORDON, JJ.) was as follows:—

As to the preliminary objection taken, we hold that an Additional Judge appointed to sit to hear cases under the Land Acquisition Act is a District Judge within the meaning of s. 39, and we think that, having regard to the provisions of s. 647, Code of Civil Procedure, an appeal lies to this Court.

As to the appeal itself, we think that there is no ground on which it can be sustained, and we therefore dismiss the appeal with costs to the respondent, who appears, other than the Secretary of State. We give no costs to the Secretary of State, who appeared, but stated that he had no interest in the matter.

C. D. P. *Appeal dismissed.*

Before Mr. Justice Norris and Mr. Justice Beverley.

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August 4.

BHIM SINGH (PLAINTIFF) *v.* SARWAN SINGH (DEFENDANT).*

Sale in execution of decree—Failure by purchaser to make the deposit required by s. 306 *of the Civil Procedure Code—Material irregularity in conducting sale—Civil Procedure Code (Act XIV of* 1882), *ss.* 244, 306, 308, 311 *and* 312.

Failure on the part of the person declared to be the purchaser at a sale in execution of a decree to make, and on the part of the officer conducting the sale to receive, the deposit of 25 per centum on the amount of the purchase-money in the manner required by s. 306 of the Code of Civil Procedure constitutes a material irregularity in conducting the sale, which must be inquired into upon an application under s. 311, and consequently a separate suit to set aside a sale on such a ground will not lie.

Intizam Ali Khan v. *Narain Singh* (1) dissented from.

THE facts of the case which gave rise to this appeal were as follow:—

The defendant Sarwan Singh and one Kashi Nath Pandey had both obtained money decrees against the plaintiff Bhim Singh, and had proceeded to execute them at the same time. The plaintiff's 8 annas share in mouzah Manamath being attached in execution of one of the decrees, an order was passed under s. 295 of the Code of Civil Procedure for the rateable distribution of the sale proceeds between the two decree-holders; and thereafter the property was advertised for sale in the month of October 1885. On the application of the plaintiff Bhim Singh, the sale was postponed till the 9th November 1885, and without any fresh sale proclamation being made it actually took place on the 10th November. The plaintiff alleged that, owing to the date of the sale not being known, no bidders attended, and as a matter of fact the only persons who did bid for the property were the defendant's karpardaz and his pleader, and the property was knocked down to the defendant Sarwan Singh for Rs. 150. It was further alleged by the plaintiff, and found as a

* Appeal from Appellate Decree No. 436 of 1888, against the decree of F. Cowley, Esq., Judicial Commissioner of Chota Nagpur, dated the 25th of November 1887, reversing the decree of Syed Abdul Aziz, Munsiff of Chatra, dated the 31st March 1887.

(1) I. L. R., 5 All., 316.

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fact by the Court of first instance, that no earnest money was deposited by the defendant, as required by s. 306 of the Code, and that he did not deposit the purchase-money in Court, and the plaintiff complained that, notwithstanding that fact, the Court passed an order on the 9th January 1886 confirming the sale, and that thereafter the defendant applied for leave to deposit the purchase-money and earnest money, which was granted.

The plaintiff contended that owing to the irregularities in publishing and conducting the sale the property had been sold at a gross under-value, and that instead of Rs. 150 it ought to have fetched Rs. 1,000, and he accordingly prayed that the sale might be set aside.

The defendant denied, amongst other things, that any irregularity had taken place or that the plaintiff had suffered any loss, and contended that the suit would not lie having regard to the provisions of ss. 311 and 312 of the Code of Civil Procedure. The other contentions raised by the defendant are not material for the purpose of this report.

Kashi Nath Pandey, at the time the plaintiff instituted this suit, also instituted a suit to have the sale set aside on similar grounds to that urged by the plaintiff, and by the consent of the parties both suits were tried together.

Amongst the issues raised in the case was one as to whether the question between the parties was not one that should have been decided in the execution proceedings, and whether the suit was not on that account barred. This was the only issue material for the purpose of the decision of the appeal by the High Court.

The Munsiff, having decided the other issues in favour of the plaintiff and Kashi Nath, and having held upon grounds which fully appear in the judgment of the High Court that the suit was not barred, set aside the sale, and ordered the defendant to pay the costs of the two suits, and declared that Kashi Nath Pandey was entitled to have the property sold in execution of his decree.

The defendant Sarwan Singh thereupon appealed against the decree in Bhim Singh's suit, and at the hearing of the appeal Bhim Singh failed to appear either in person or by pleader, though he had filed a vakalutnama.

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The Judicial Commissioner reversed the decree of the Munsiff for reasons which are fully stated in the judgment of the High Court, and dismissed the plaintiff's suit with costs.

The plaintiff Bhim Singh now preferred this second appeal.

Baboo *Jogesh Chunder Roy* for the appellant.

Baboo *Dwarka Nath Chuckerbutty* and Baboo *Surendra Nath Roy* for the respondent.

The following judgments were delivered by the High Court (NORRIS and BEVERLEY, JJ.):—

NORRIS, J.—The facts of this case are as follows:—

The defendant and one Kashi Nath Pandey had each obtained a money decree against the plaintiff; either one or both of the judgment-creditors attached 8 annas of mouzah Manamath, the property of the plaintiff, the judgment-debtor. After the attachment, the Court executing the decree made an order under s. 295 of the Code of Civil Procedure for the rateable distribution of the sale proceeds between the two decree-holders. The attached property was sold and purchased by the defendant, who however did not make the deposit required by s. 306 of the Code.

The plaintiff and Kashi Nath each brought a suit to have the sale set aside. The two suits were tried together by the Munsiff, who set aside the sale.

The defendant appealed to the Judicial Commissioner against the decree setting aside the sale passed in the suit brought against him by the plaintiff. The plaintiff-respondent did not appear at the hearing of the appeal, and the Judicial Commissioner decided the case *ex parte*; he reversed the Munsiff's decree, and dismissed the suit with costs.

The issues framed by the Munsiff were applicable to both suits; the only one which it is material to consider is the first, which ran thus: "Whether the suit for setting aside the sale will lie, or ought the plaintiff to have given petition for setting aside the sale under s. 312 of the Civil Procedure Code?"

Upon this issue the Munsiff's judgment was as follows: "As regards the issue No. 1, I am of opinion that neither Kashi Nath Pandey nor Bhim Singh (the plaintiff) were precluded from

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bringing a suit, as the facts of the case show that in consequence of the earnest money and the purchase money not being paid in time, there was in fact no sale—see *Intizam Ali Khan* v. *Narain Singh* (1)." On appeal to the Judicial Commissioner only one ground of appeal apparently was argued, which in effect ran thus: "The Munsiff in deciding issue No. 1 has held that plaintiff was entitled to sue to set aside the sale of 8 annas of Manamath, but this is wrong, because the plaintiff was the judgment-debtor in the suit in execution of which the sale took place." Upon this point the Judicial Commissioner said: "It seems to me that this plea is good under cl. (*c*) of s. 244 of the Code of Civil Procedure. The question whether there had in law been a sale of Bhim Singh's property in execution of the decree held by Sarwan Singh against Bhim Singh was one arising between the parties to the suit in which the decree was passed and relating to the execution, discharge or satisfaction of the decree, and was consequently one to be determined by order of the Court executing the decree and not by separate suit. I set aside the Munsiff's decree in this suit, in which Bhim Singh was plaintiff and Sarwan Singh defendant, and direct that this suit be dismissed."

In special appeal two points were raised: First, that the lower Appellate Court was in error in holding that the suit would not lie, and that it was barred under clause (*c*) of s. 244 of the Civil Procedure Code; second, that no issue having been raised as to the suit being barred under clause (*c*), s. 244 of the Civil Procedure Code, and no such grounds having been taken in the petition of appeal, the lower Appellate Court ought not to have allowed the defendant to urge that point.

I do not think that there is anything in the second objection.

It is true that no issue was raised as to the suit being barred under clause (*c*) of s. 244 of the Code of Civil Procedure; but the determination of the point did not depend upon evidence; it was a pure point of law, and I think the Judicial Commissioner was justified in dealing with it if it was properly raised before him by the grounds of appeal.

It is not I think correct to say "that no such grounds were taken in the petition of appeal," for, though there is

(1) I. L. R., 5 All., 316.

no distinct reference to clause (*c*) of s. 244, there is in the petition of appeal a distinct allegation that the Munsiff was wrong in decreeing the suit, "because the plaintiff was the judgment-debtor in the suit in execution of which the sale took place." This I think meant "the question raised is one between the parties to the suit and no separate suit will lie."

The decision of the first point taken before us is not free from difficulty, and involves a careful consideration of ss. 244, 311, and 312 of the Code.

Two questions seem to arise upon a consideration of these sections with reference to the facts of this case; first, does a decree-holder cease to be "a party to the suit in which the decree was passed" if he becomes an auction-purchaser? and second, when do "questions relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof" cease to arise for determination?

Upon the first question there is a conflict of authority—see *Viraraghava Ayyangar* v. *Venkatacharyar* (1) and *Hera Lal Chatterjee* v. *Gourmoni Debi* (2).

The second question has lately been discussed by Mahmood, J., at great length in *Ramchhaibar Misr* v. *Bechu Bhagat* (3).

I have carefully considered both these questions; and had it been necessary to decide them, I should have thought it well to refer them to a Full Bench; but in the view I take of the applicability of ss. 311 and 312 to this case, I do not think it is necessary.

There remains one more question for consideration, *viz.*, does a non-compliance with the provisions of s. 306 of the Code constitute "a material irregularity in conducting the sale" which must be inquired into upon an application under s. 311, or does it furnish ground for a suit to set aside the sale? I am of opinion that such non-compliance is "a material irregularity" in conducting the sale which must be inquired into upon an application under s. 311.

It is to be observed that s. 306 deals with two persons present at a sale of immoveable property under Chapter XIX of the Code,

(1) I. L. R., 5 Mad., 217. (2) I. L. R., 13 Calc., 326.
(3) I. L. R., 7 All., 641.

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viz., "the person declared to be the purchaser" and "the officer conducting the sale." The duty of "the person declared to be the purchaser" is "to pay immediately after such declaration a deposit of twenty-five per centum on the amount of his purchase-money to the officer conducting the sale."

The duties of "the officer conducting the sale" are of a two-fold character. In the first place there are the duties which are inherent to his position as an auctioneer; and, in the second place, there are the duties prescribed to him by the Code. Amongst the duties inherent to his position as an auctioneer are—(*a*) the duty of knocking down the property to the highest bidder, and (*b*) the duty of demanding the deposit of twenty-five per centum. Amongst the duties prescribed to him by the Code is that of "*forthwith* putting up the property again and selling it" if default is made in making the deposit. The word *forthwith* is worthy of special attention. The sale is not to be adjourned; the putting up of the property again and soliciting fresh bids is a continuation of the original sale, a part and parcel of the proceedings which had their origin in the first putting up of the property, and which do not come to an end until the property has been knocked down to a purchaser and that purchaser has made the statutory deposit.

This I think is the clear meaning of s. 306.

And this view is strengthened by a reference to s. 308, which regulates the procedure upon default being made in payment of the balance of the purchase-money. In that case the property is to be *re-sold;* and such re-sale cannot take place without the issue of a fresh sale-proclamation and the performance of all the other conditions precedent to a sale prescribed by the Code.

It may be that, if the Legislature had been silent as to the duty of the officer conducting the sale upon default being made in making the deposit, that the failure of the person declared to be the purchaser to make the deposit would not have been an irregularity in conducting the sale; but it seems to me impossible to conceive of a greater irregularity in the conduct of a sale than the failure of the officer conducting it to do what the Legislature has in express terms told him to do on a default being made in the making of the deposit.

I am aware that this view is opposed to that taken by the Allahabad High Court in *Intizam Ali Khan* v. *Narain Singh* (1), but I venture respectfully to think that an examination of the facts of that case will show that the judgment cannot be treated as an authority.

In that case Intizam Ali Khan, the judgment-debtor, had applied to have a sale of his property, which had been sold in execution of a decree, set aside, *inter alia*, on the ground of a non-compliance with the provisions of s. 306. The application was made and could only have been made under s. 311; and although the Court held that, "inasmuch as the indispensable conditions of the law as contained in s. 306 of the Civil Procedure Code were not fulfilled by the person declared to be the purchaser, the sale was not bad by reason of an irregularity in publishing or conducting it, but was no sale at all," it yet set aside the sale under s. 312, which only authorizes the setting aside of a sale on the ground of a material irregularity in publishing and conducting it.

In the result therefore I am of opinion that the plaintiff's suit and this appeal should be dismissed, but under the circumstances of the case without costs.

BEVERLEY, J.—I concur in holding that the present suit will not lie for the following reason :—

The ground upon which it is sought to set aside the sale is the non-compliance with the provisions of s. 306 of the Code. I concur with my learned colleague in holding that such a non-compliance, if substantiated, would amount to an irregularity in conducting the sale such as is referred to in s. 311. It should, therefore, in my opinion have been made the subject of objection under that section before the sale was confirmed. Sections 311 and 312 provide a special procedure, open to both the decree-holder and the judgment-debtor, for the determination of disputes arising out of irregularities in publishing and conducting sales, and I am of opinion that it was the intention of the Legislature that all such disputes should be determined under the provisions of those sections in the course of the execution

(1) I. L. R., 5 All., 316.

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proceedings, and not by way of a regular suit after the sale has been confirmed. Section 312 distinctly bars a suit to set aside, on the ground of irregularity, an order made under that section, and that includes an order confirming the sale, even when no application has been made under s. 311 to have it set aside. That being so, I am of opinion that the present suit cannot be maintained, and I agree in dismissing the appeal without costs.

H. T. H. *Appeal dismissed.*

PRIVY COUNCIL.

P. C.* 1888. *March* 8 & 9, *April* 21.

HARI SARAN MOITRA (PETITIONER) *v.* BHUBANESWARI DEBI (FOR HERSELF AND AS GUARDIAN OF JOTINDRAMOHUN LAHIRI, A MINOR) AND ANOTHER (OBJECTORS).

[On appeal from the High Court at Calcutta.]

Execution of decree—Mesne profits—Decree made against a widow representing estate, enforced against a minor adopted son, through the widow as his guardian—Devolution of liability, along with estate, upon the minor, without his having been made formally a party to the decree—His similar liability in a suit for mesne profits.

A minor, who had been adopted by a widow as a son to her deceased husband, was not made a party to an appeal, which she preferred after the adoption, from a decree made against her when she represented the estate. *Held*, that, as liability under the decree, made when the widow fully represented the estate, devolved upon the minor on his adoption, the widow's estate being also thereupon devested, it would be right for her to continue to defend, but only as guardian of the minor. Also, that it having been for the minor's benefit that the widow, as guardian, should appeal from a decree, which had already diminished his estate, the minor was bound by the adverse decree of the Appellate Court, although he had not been made, formally, a party thereto. The principle of the decision in *Dhurm Dass Pandey* v. *Shamasoondery Debia* (1) referred to, and applied in this case.

* *Present :* LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK, and SIR R. COUCH.

(1) 3 Moore's I. A., 229.